No. 83-2030

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF
THE CITY OF OKLAHOMA,
STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the balancing test derived from *Pickering v. Board of Education*, 391 U.S. 563 (1968), in simply disregarding the state's compelling interest in protecting the well-being of schoolchildren from the dangers of indoctrination towards illegal homosexual acts.

2. Whether the Court of Appeals misapplied *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), in holding that a statute aimed at preventing both the immediate and long-term danger of such indoctrination or advocacy could only be justified by the imminent likelihood of "substantial disruption" or incitement to lawless action.

3. Whether the Court of Appeals erred in holding the statute facially unconstitutional on "overbreadth" grounds where the statute specifies that no disciplinary action may be taken against an offending teacher without mandatory consideration of listed factors which plainly safeguard against penalizing legitimately protected speech.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

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INTEREST OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a national, nonprofit public interest law center, based in Washington, D.C., that engages in litigation and the administrative process in matters affecting the public and national interest. WLF has more than 80,000 members located throughout the United States—includ-

ing in the State of Oklahoma—whose interests the Foundation represents.

WLF files this brief *amicus curiae* in support of the appellant Oklahoma City Board of Education with the written consent of all parties.

WLF devotes a substantial portion of its resources to cases involving the preservation of traditional family values and the defense of the constitutional rights of law-abiding citizens. The Foundation asserts the interests of its members in this area through programs such as its Drug Alert Project, which focuses on judicial and administrative proceedings involving the spread of dangerous drugs in our schools and workplace. WLF has also focused particular attention on the rights of children and their parents to a safe and wholesome public school environment. As part of its activities in that area, WLF recently filed a brief *amicus curiae* in the Supreme Court case of *New Jersey v. TLO*, No. 83-712, arguing that the application of the exclusionary rule to the public school environment would undermine the maintenance of school security, discipline and safety.

WLF's efforts also extend to protecting the religious rights and values of its members when they are threatened by government actions or legal interpretations reflecting hostility toward traditional religious values. Last year, for example, WLF submitted a brief *amicus curiae* in successful support of the City of Pawtucket, Rhode Island's right to display a Christmas Nativity Scene in *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984).

The Tenth Circuit's decision in this case represents a serious assault on the state's power to take preventive measures to assure a safe and wholesome environment in the public schools. The statute struck down by that Court does nothing more than codify a proposition which should be obvious in any sane society: That a public school teacher who publicly advocates and encourages the com-

mission of homosexual sodomy, in a manner likely to be heard by young schoolchildren, has demonstrated at least *prima facie* grounds for dismissal on grounds of unfitness.

If a state may not pass such reasonable legislation to prevent the threat of schoolchildren being proselytized for dangerous and corrupting homosexual practices, then WLF believes our democratic institutions have wandered far astray from their most fundamental purposes.

No reasoned interpretation of the First Amendment bars the states from assuring that public school teachers refrain from conduct or utterances which could corrupt and endanger the schoolchildren entrusted to their influence. The Oklahoma statute at issue validly serves that very purpose. Moreover, it serves to protect the parents' fundamental interest in the direction and control of their children's education—an interest which is also of constitutional dimensions. WLF therefore seeks to advance the interests of its members by seeking reversal of the Tenth Circuit decision striking down this valid and proper exercise of the state's power to regulate public schools.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus curiae* adopts the statement of the case set forth in the brief of appellant Board of Education of the City of Oklahoma.

SUMMARY OF ARGUMENT

1. There is a compelling state interest in safeguarding the well-being, health, and morality of children. That state interest has been repeatedly invoked by this Court to sustain various restrictions on First Amendment activity which threatens the well-being of children. The state's obligation to protect children is all the more grave in connection with the public school's educational process —because the state *requires* parents to send their chil-

dren to school. Public school teachers act as "trustees" for the well-being of schoolchildren. The state is empowered and, in fact, obligated to take necessary measures to assure that no public school teacher engages in conduct or speech which would threaten or injure the physical, psychological, or moral well-being of the children entrusted to him. The Oklahoma statute at issue here represents such a permissible measure, and its underlying purpose—to protect children from inducement to illegal homosexual acts—plainly justifies the limited restrictions on the speech rights of those who aspire to the role of public school teacher.

2. The case law has long recognized that restrictions on the speech of public employees may be sustained even where such restrictions could not be constitutionally applied to the citizenry-at-large. The same general principles which can sustain the legality of the Hatch Act's restrictions on the treasured political expression of federal civil servants surely can support restrictions on the asserted "right" of certain teachers to advocate illegal and dangerous homosexual activity to children. Under the balancing test applied in public employee speech restriction cases, the scales surely must tip in favor of protecting the welfare of children as against a teacher's right to preach the virtues of homosexual activity.

3. The Oklahoma statute does not impermissibly limit discussion on legitimate public issues, nor does it constitute a prior restraint on speech. As such, it is not subject to the more stringent constitutional standards applicable to laws which fit those categories. Rather, this case concerns a challenge to the facial validity of a statute carefully drawn by the legislature to achieve a clearly compelling state interest. A finding of facial invalidity could only be made if the statute is not susceptible to a legitimate construction which would preserve its validity. This statute is intended to be—and readily *can* be—applied in a manner which affects only overt inducement

and advocacy of specific immoral and illegal acts. It certainly does *not* prohibit Oklahoma schoolteachers from legitimate discussion, such as urging the repeal of laws deemed offensive to homosexuals; such discussion is *permitted* under the statute, which applies solely to the actual *advocacy* or *solicitation* of certain sexual acts prohibited by Oklahoma law. So construed, the statute does not intrude on any legitimate First Amendment rights and is plainly constitutional.

ARGUMENT

This case concerns a State Government's right to adopt legislation carefully designed to protect the physical, mental, and moral well-being of schoolchildren. It also brings into sharp focus the trend towards judicial interference with state legislative prerogatives, under the asserted banner of the First Amendment.

As in many other states, certain acts associated with homosexual behavior are illegal and condemned by public policy in the State of Oklahoma. *Oklahoma Statutes*, Title 21, Sec. 886.[1] Notwithstanding the criminal illegality of such practices, there has been an enormous growth in the amount of literature, media programming, and other propaganda which advocates and even exalts the homosexual way of life.[2] Meanwhile, the serious and tragic health problems and disease associated with homosexual activity have become well-documented.[3] Oklahoma

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[1] The Supreme Court has upheld the constitutionality of state criminal statutes prohibiting sodomy and kindred acts. *Wainright v. Stone*, 414 U.S. 21 (1973). There is no constitutional right to engage in homosexual acts. *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

[2] *See*, Rueda, *The Homosexual Network*, pp. 24-25, 227-230 (Devin Adair, 1982) (hereinafter cited as "Rueda").

[3] Most striking in this regard is the well-established correlation between certain homosexual activity and the incidence of the deadly acquired immune deficiency syndrome ("AIDS"), discussed further *infra*.

has joined other states and localities which have grown justifiably concerned that repeated public endorsements of homosexual behavior can have a damaging effect on the impressionable minds of growing children.

Because public school teachers have such a strong influence upon their students, it is important that their special position not be abused. The vast majority of public school teachers serve admirably and honorably in their critical role; the preservation of their collective reputation is essential to the integrity of the public school system.

Yet it is a matter of public record that some homosexual rights groups advocate using the public schools as a forum for openly promoting the virtues of the homosexual lifestyle.[4] This "gay lifestyle" includes commission of the very sexual acts forbidden by Oklahoma Law and the laws of other states.

The State has a compelling interest in assuring that schoolchildren will not be subjected to advocacy or inducement of homosexual acts by any of the teachers who wield such great influence over them. Such acts not only violate state law, but present a terrible threat to the physical and psychological health of children.

Thus, the State's fundamental interest in assuring the well-being of schoolchildren more than justifies the very narrow and carefully-focused limits on the speech rights

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[4] Rueda, p. 162, quoting the published goals of the Gay Teachers Association of New York City, which included:

> "4. To promote curriculum change in all subject areas to enable gay and nongay students to gain a realistic and *positive concept of current gay lifestyles. . .*" [emphasis added].

There are similar homosexual teachers' associations in Boston, Colorado, San Francisco, Los Angeles, Baltimore. and Ann Arbor, Michigan. *Id.* Books advocating the virtues or acceptability of homosexual behavior have already found their way into grammar school libraries. *Id.* at 230.

of teachers embodied in the statute at issue. *Cf. Ginsberg v. New York*, 390 U.S. 629 (1969) (State has special, overriding interest in protecting children from corrupting influence of indecent materials). In striking down the Oklahoma statute, the Court of Appeals inexcusably ignored this overriding factor.

Significantly, the statute in question in no way purports to exclude homosexuals from serving as public school teachers. It merely provides that those who openly *advocate* specific homosexual acts have manifested *prima facie* grounds for a determination that they are unfit to serve as public school teachers. This measure is plainly justified by fundamental state interests and entails only an insignificant burden on legitimate First Amendment interests.

I. THE OKLAHOMA STATUTE IS JUSTIFIED BY THE STATE'S SPECIAL INTEREST IN PROTECTING THE WELL-BEING OF SCHOOLCHILDREN.

In declaring the Oklahoma statute unconstitutional on its face, the Tenth Circuit has engaged in unwarranted interference with state legislative prerogatives which are fundamental to the preservation of a safe and decent society. The court's decision demonstrates remarkable insensitivity to the genuine concerns of parents and the State of Oklahoma regarding the danger that overt advocacy by teachers of illegal and unhealthy homosexual practices would pose to the physical and psychological well-being of young schoolchildren. At the same time, the court based its decision on an exaggerated and wholly unrealistic interpretation of the actual impact the statute would have on the legitimate free speech rights of teachers.

A. Reasonable Restrictions on Unfettered Free Expression May be Justified by the State's Special Obligation to Protect Children.

Analysis of this case must begin with recognition of the very special obligations assumed by the state in the

public education of children. The state, after all, compels parents to send their children to school, *see Wisconsin v. Yoder*, 406 U.S. 205 (1976), and most parents find it necessary to send their children to *public* school. It follows that parents and schoolchildren have a legitimate and basic expectation that the public school environment will be a healthy and safe environment. It requires no citation of authority to posit that the state is obliged to take all reasonable precautions to exclude pernicious and corrupting influences from the public educational process.

This principle applies with special force to the critical and sensitive leadership role played by our public school teachers. It was well-stated by this Court in *Adler v. Bd. of Education*, 342 U.S. 485, 493 (1952):

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as part of ordered society, cannot be doubted.

With that object in mind, the *Adler* decision rejected a First Amendment challenge to a New York law which made membership in certain subversive organizations *prima facie* grounds for teacher disqualification. Referring to the limitations on unfettered speech which are "inherent" in the teacher's role, the Court stated:

> Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.

The *Adler* decision also stressed that the particular "fitness" which the state may require of its teachers is not confined to classroom conduct alone, but extends to

a broad range of pertinent activities and factors. 342 U.S. at 493.

The courts' approval of regulations affecting the job-related conduct and speech of public school teachers has not been lightly given. Like the long-recognized restrictions on the political expression of certain government officials embodied in the Hatch Act, 5 U.S.C. § 7324, *see United Public Workers v. Mitchell*, 330 U.S. 75 (1947), they are grounded on strong countervailing interests which may sometimes override the predilections of the affected government servant.

In *Brantly v. Surles*, 718 F.2d 1354, 1359 (5th Cir. 1983), for example, the court articulated some of the pertinent considerations which may justify restrictions on the conduct and speech of public school teachers:

> The parental interest in the direction and control of a child's education is central to the family's constitutionally protected privacy right.
>
> * * * *
>
> The state may legitimately interfere with the constitutionally protected conduct of a public school employee whenever that conduct materially and substantially impedes on the operation or effectiveness of the educational program.

It is hard to conceive of any healthy educational program which would *not* be disrupted by the dissemination of homosexual advocacy by teachers to schoolchildren.

Related considerations were addressed by the court in *Acanfora v. Board of Education of Montgomery County*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836, a case involving a teacher's public remarks in defense of homosexuality.[8] Importantly, that court was deeply

[8] In *Acanfora*, the Court of Appeals disagreed with the district court's holding that a gay teacher's repeated media appearances in

troubled by the effect of a teacher's public remarks which did not actually *advocate* homosexual acts, and which would not have been prohibited by the statute here at issue. As that court stated, 359 F. Supp. at 856:

> As a result of the distinguishing obligations which a person assumes upon signing a contract to teach children, the standard must shift to accord with the goals of the educational process. The question becomes whether the speech is likely to incite or produce imminent effects deleterious to the educational process.

Concerning the impact of the teacher's publicized statements championing homosexual issues, the court observed (*id.*):

> [I]t does not best serve the purposes of sexual adjustment, maturation and student-parent relationships in the educational context. These questions are charged with emotion and of such a delicate and sensitive nature that the injection of controversy tends to breed misunderstanding, alarm and anxiety.

These considerations apply with far greater force where (as here) the speech in question advocates illegal homosexual acts rather than merely defending the legitimate rights of homosexual persons.

B. The State's Obligation to Maintain a Safe and Decent Educational Environment Justified Measures to Prevent Teachers from Advocating Homosexual Activity Insofar as it May Impact on Schoolchildren.

In passing on the validity of the Oklahoma statute, it should be remembered that it was enacted not to harass any homosexual teachers but to protect children. The

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defense of homosexuality were simply not protected by the First Amendment, but affirmed on other grounds. But the teacher in *Acanfora* had not *advocated* homosexuality, merely defended it against discrimination. 359 F. Supp. at 856.

state has no plausible reason to impose unnecessary speech restrictions on its teachers—especially when the statute was sure to be forcefully opposed by the well-organized forces which champion the "normalization" of homosexual activity.[6] That the state is not engaged in an effort to persecute any homosexual teacher is demonstrated by the fact that the statute conspicuously avoids making *private* homosexual activity even *prima facie* grounds for dismissal proceedings—even though such acts are criminal violations under Oklahoma law, *Oklahoma Stats.*, Title 21, Sec. 886.

The language of the statute is carefully circumscribed to reach only speech which would tend to encourage or predispose schoolchildren towards engaging in homosexual acts. Some of the restrictions imposed—i.e., the "soliciting" or "imposing" of homosexual activity—are so obviously unchallengable that even the Court of Appeals decision excluded them from the portion of the statute held unconstitutional. 729 F.2d at 1275. While the "advocacy," "encouragement," or "promotion" of such activities by teachers (i.e., those portions struck down by the panel) may present a less immediate danger to children, they surely constitute a sufficient threat to justify the preventive measures enacted.

The State has a fundamental interest in assuring that schoolchildren will not be subjected to advocacy or inducement of homosexual acts by any of the teachers who wield such great influence over them. Such acts not only violate state criminal law, but present a substantial threat to the physical and psychological health of children.[7]

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[6] *See* Rueda, Ch. IV, pp. 146-196.

[7] For a deeply disturbing example of how the imposition of homosexual activity upon children by their mentors can result in fatal psychological disturbance, see *Schultz v. Roman Catholic Archdiocese of Newark*, 95 N.J. 530 (N.J. Supreme Court 1984) (action against archdiocese for negligent hiring of instructor who allegedly imposed homosexual contact on 11-year old boy attending

Notwithstanding the efforts of apologists to invest it with an aura of respectability and legitimacy, there is no escaping the fact that the cultivation of homosexuality is dysfunctional and unhealthy by the standards of any stable and vital society. Most fundamentally—and most indisputably—it undercuts the propagation of mankind and the perpetuation of a vigorous population; that is, it simply negates the procreative essence of sexual activity. Moreover, those who practice exclusive homosexuality are perforce unable to engage in marriage or the formation of natural families. The spread of practiced homosexuality therefore undercuts the preservation of the natural family—the essential foundation of our civilized society. It is well settled that the state has a fundamental interest in preserving the integrity of the family and the procreation of life.[8]

Of more immediate concern, however, is the tangible health and safety threat posed by the encouragement of homosexual practices. It is now a matter of public record that the deadly acquired immune deficiency syndrome ("AIDS") is conclusively associated with homosexual activity; homosexual (including bi-sexual) males accounted for some 72% of the reported 6,620 cases of AIDS among Americans as of October 29, 1984.[9] The risk of numerous other sexually transmitted diseases is dramatically increased among practicing homosexuals, as acknowledged in the homosexual media itself.[10]

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camp, resulting in boy's psychological deterioration and ultimate suicide).

[8] *See, e.g., City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2492 (1983); *Roe v. Wade*, 93 S. Ct. 705, 730-31, 410 U.S. 159, 163 (1973).

[9] *Washington Post*, November 5, 1984, p. A6, reporting data supplied by the Centers for Disease Control; U.S. Dept. of Health and Human Services, Centers for Disease Control, *Morbidity and Mortality Weekly Report* at 27 (Aug. 1984).

[10] See Rueda at pp. 49-56; Darrow, W.W., *et al., The Gay Report on Sexually Transmitted Disease*, 71 American Journal of Public Health 1004 (1981).

These facts demonstrate that the homosexual practices referred to in the Oklahoma statute involve a serious risk to health and safety. Surely the state is justified in taking every reasonable precaution to assure that schoolchildren are insulated as fully as possible from that risk.

It is of particular significance that the Oklahoma statute restricts homosexual advocacy only to the extent that it is likely to come to the attention of schoolchildren. This Court has long recognized that the unfettered exercise of First Amendment rights must sometimes accommodate the state's fundamental interest in protecting the well-being of children. Even where the invasion of protected freedoms may be concerned, "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

In *Ginsberg v. New York*, 390 U.S. 629 (1967), for instance, the Court upheld New York's laws prohibiting the sale to minors of sexually suggestive materials which would have been protected by the First Amendment if sold only to adults. In so holding, the Court observed (390 U.S. at 639):

> The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations . . . upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful . . . First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of children is basic in the structure of our society . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to

the support of laws designed to aid discharge of that responsibility.

Significantly, the *Ginsberg* decision rejected the inevitable argument that speech restrictions otherwise justified by the child protection principle should be rejected if they pose any threat to protectable adult interests: "We do not demand of legislatures 'scientifically certain criteria of legislation.'" 390 U.S. at 642-43.

The Court further developed this same principle in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978). There, the Court rejected First Amendment arguments challenging the application of FCC regulations to prohibit the broadcast of a "patently offensive" but arguably non-obscene, monologue by comedian George Carlin. Initially, the Court cautioned that judicial interference with regulations governing such offensive matter could *not* be justified on the basis of extreme, hypothetical applications which had not in fact occurred:

> Invalidating any rule on the basis of its hypothetical applications to situations not before the court is "strong medicine" to be applied only "sparingly and as a last resort."

The Court then pointed out two characteristics of broadcasters which justify restrictions on their First Amendment freedoms which would not be sustainable if applied at large. First, broadcasters have "a uniquely pervasive presence in the lives of Americans," 438 U.S. at 748. Second, "broadcasting is uniquely accessible to children," *id.*

Significantly, both of these considerations are directly applicable to the status of public school teachers in relation to schoolchildren. They, too, have a "uniquely persuasive presence" in the lives of schoolchildren, insofar as the children are the teacher's "captive audience" for some six hours a day, five days a week. Likewise, the

teacher's pronouncements are "uniquely accessible to children," for the very same reason.

The Court in *FCC v. Pacifica Foundation* then invoked the child protection principle in upholding direct government restrictions on the broadcaster's freedom of expression (438 U.S. at 744):

> We held in *Ginsberg v. New York*, 390 U.S. 629, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression.

The very same principle holds true here. The modest and carefully confined regulation of the public speech of state schoolteachers is firmly grounded on legitimate concern for the well-being of children and the parental right to protect those children from propaganda advocating homosexual sodomy. Thus, the child-protection principle enunciated in *Ginsberg* and *FCC v. Pacifica* provides compelling justification for upholding the Oklahoma statute.

More than that, these cases recognize that the parents' interest in the direction and control of a child's education is central to *the family's constitutionally protected privacy rights. See, e.g., Brantly v. Surles, supra,* 718 F.2d at 1359. A given public school teacher's claim to an unfettered right to advocate homosexual behavior is therefore not the only constitutional right at issue here. And while the affected teacher is subjected to this narrow speech restriction only insofar as he chooses to hold his trusted public office, the vast majority of schoolchildren constitute a captive audience in relation to their public school teachers; their dependence on their teachers as an all but mandatory source of information, influence, and guidance gives added weight to the family's interest in the fitness of those teachers.

The legislation at issue should thus be viewed for what it really is: A legitimate component of the standard of fitness which parents and schoolchildren have a fundamental right to expect of public schoolteachers.

II. THE STATUTE CONSTITUTES A REASONABLE REGULATION RESPECTING THE ACTIVITIES OF GOVERNMENT EMPLOYEES PERFORMING AN ESPECIALLY SENSITIVE TASK.

In discounting the compelling concerns which underlie the statute—while misconstruing its carefully modulated impact on protectable speech—the Tenth Circuit misapplied the balancing test which governs functionally-related restrictions on the conduct and expression of public employees entrusted with specially sensitive offices. *Connick v. Myers*, 103 S. Ct. 1684, 1689-91 (1983); *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968); *Adler v. Bd. of Education*, 342 U.S. 485, 492-94 (1952). The state's overriding concern with protecting the well-being of schoolchildren surely justifies the narrow and flexible restrictions on potentially corrupting speech which are expressed in the Oklahoma statute.

Aside from the fact that the Oklahoma statute *prohibits no speech* (discussed further, *infra*), its limited effect on First Amendment rights is confined to those who aspire to hold a very special public trust. In giving notice that the public advocacy of illegal homosexual acts will trigger proceedings challenging their fitness as teachers, the statute seeks to assure that the few teachers inclined towards such advocacy will not abuse their influence and control over the children entrusted to them.

Such regulation of the conduct and speech of public employees performing sensitive tasks stands apart from First Amendment restrictions applicable to the general citizenry. *Connick v. Myers*, *supra*, 103 S. Ct. at 1689-91; *Pickering v. Board of Education*, *supra*, 391 U.S. at 568; *Landrum v. Eastern Kentucky*, 578 F. Supp. 241, 246-47 (E.D. Ky. 1984); *Childers v. Independent School District No. 1*, 676 F.2d 1338, 1341-42 (10th Cir. 1982). These cases establish a rational balancing process, in which the importance of the statutory objective is weighed against the resultant limitation on the speech rights of the government employee. If the statute or regulation is reasonably drawn, so that the speech restrictions are minimized, a fundamental state interest will sustain the resultant restriction.

A. The Balancing Test Supports the Statute's Constitutionality.

In *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), for instance, this Court upheld the constitutionality of a federal statute (the Hatch Act, 5 U.S.C. § 7324) which prohibited even an industrial employee of the federal government from exercising his First Amendment right to take an active part in political campaigns. This recognition that the speech or associational rights of public employees must sometimes bow to the greater public good was reaffirmed in *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). Since the general needs of the federal civil service may validly restrict the federal employee's right to participate in wholesome political speech, it is farfetched indeed to hold that the fundamental obligations of the public educational system may not justify restrictions on a public schoolteacher's "right" to promote and advocate corrupting homosexual activity. Clearly, the Hatch Act decisions provide compelling precedent for upholding the Oklahoma statute.

Related considerations were addressed in the case of *Connick v. Myers*, *supra*, where this Court rejected First Amendment challenges to the discharge of an assistant district attorney for circulating a nettlesome questionnaire to co-workers. Referring to the balancing test enunciated in *Pickering v. Bd. of Education*, *supra*, the Court noted that (103 S. Ct. at 1692):

> The *Pickering* balance requires *full consideration* of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. [emphasis added].

On this point alone, the Tenth Circuit's decision should be reversed. That Court gave virtually *no* consideration at all to the harmful effects of teachers advocating the "virtues" of homosexual acts to young schoolchildren.

Moreover, in applying the balancing test to the speech restrictions at issue there, the *Connick* court stressed that:

> [W]e do not see the necessity to an employer to allow events to unfold to the extent that the disruption . . . is manifest before taking action.

The Court also stressed that the state's right to impose speech restrictions for legitimate government objectives:

> [V]aries depending upon the employee's expression. Although such particularized balancing is difficult, the Court must reach the most appropriate balance of the competing interests," [103 S. Ct. at 1692].

Here, the District Court properly balanced these competing interests and held that the state's interest in protecting children from homosexual indoctrination outweighed the very narrow and qualified restriction on teachers' advocacy of homosexual acts. The Court of Appeals clearly erred in rejecting the District Court's well-reasoned resolution of the competing interests.

While not directly implicating free speech considerations, the D.C. Circuit's recent decision in *Dronenburg v. Zech*, 741 F.2d 1338 (D.C. Cir. 1984), is instructive on the broader issues involved in this case. In *Dronenburg*, the Court rejected the plaintiff's argument that the Navy's policy of mandatory discharge for homosexual conduct (including "solicitation") violated his constitutional right to privacy and equal protection. The

D.C. Circuit (per Bork, J.) squarely denied the existence of any constitutional right to engage in homosexual conduct (*Id.* at 20). Moreover, in describing the powerful state interests which plainly justified the Navy's policy requiring the discharge of those who engage in homosexual conduct, the Court stressed that "legislation may implement morality" and pointed out the dangers to institutional morale and good order posed by homosexual behavior. (*Id.* at 21).

If such considerations are enough to sustain restrictions on homosexual behavior among grown men in the U.S. Navy, how much more compelling may they be in the educational environment surrounding developing schoolchildren?

B. *Tinker* and *Brandenburg* Provide No Valid Basis for Striking Down the Statute.

The Tenth Circuit erred further in misapplying the holding of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), where the Court upheld a student's First Amendment right to wear black armbands as a symbolic political protest. In *Tinker*, the Supreme Court stressed the passive, non-disruptive nature of the symbolic protest, and stated that prohibitions against such expressions of opinion by students can be justified only if they would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," 393 U.S. at 509. At the same time, the Court acknowledged that "the special characteristics of the school environment" may entail necessary constraints on First Amendments rights. 393 U.S. at 506. The Court further stressed that (*id.* at 507):

> On the other hand, the Court has repeatedly emphasized *the need for affirming the comprehensive authority of the states and of school officials*, consistent with fundamental constitutional safeguards, *to prescribe and control conduct in the schools* [emphasis added].

The Tenth Circuit read *Tinker* to require a demonstration of imminent and substantial disruption of educational operations in order to justify *any* restriction on speech in the school setting. It then reversed the District Court by misapplying this interpretation of the *Tinker* decision.

Here, the application of a test involving "substantial disruption of discipline" (or "clear and present danger") is unsuitable and inapposite to the issue at stake. Unlike in *Tinker*, the expression at issue here is not student behavior adverse to school discipline but teachers' statements which are detrimental to a healthy and wholesome educational atmosphere. The danger which the legislation confronts is not merely the outrageous case involving the overt seduction of a pupil; it extends as well to the long-term effects of pro-homosexual indoctrination to cultivate the notion that homosexual acts are "good" and part of a perfectly legitimate "alternative lifestyle."

While it may well be impossible to shelter children from such propaganda altogether in today's permissive society, it is another matter for the state to condone its dissemination by public school teachers to their young charges. If public school teachers publicly advocate the "benign" nature of homosexual activity, the advocacy is invested with a considerable degree of authority in the eyes of schoolchildren. The teacher's advocacy tends to place the weight and imprimatur of the school—even the state—behind the concept, and is likely to create confusion and consternation in the minds of young pupils.

These institutional considerations are more akin to those involved in the Hatch Act cases, *supra*, and should not be judged under the inappropriate standard of "substantial disruption" of school operations.[11] The more ap-

[11] For essentially the same reasons, the standard of "inciting imminent lawless action," taken from *Brandenburg v. Ohio*, 395 U.S. 444 (1969) is also inapposite to this particular regulation. The evil addressed by this statute is likely to occur in secrecy, and the State can hardly be required to prove that the acts in question are "imminent" before taking preventive measures.

propriate standard is whether the affected speech presents *a substantial threat to the well-being of young schoolchildren.* Since this statute is confined to speech which advocates or encourages unhealthy and illegal *acts* (as opposed to, e.g., a mere philosophy or lifestyle), it easily complies with such a standard.

In any event, the Oklahoma statute would pass muster under a reasonable application of even the "substantial disruption" test. The statute carefully provides that a teacher who engages in the kind of homosexual advocacy affected "*may*" (not "shall") be disciplined only upon a determination that the advocacy itself was such as to render him "unfit." Subsection C then specifies a list of factors which *must* be taken into account in making the ultimate fitness determination.

The cumulative import of the factors listed—adverse effect on students; tendency to dispose children toward criminal sodomy; repeated or continuing nature of the advocacy of such deviance—would clearly amount to a "material and substantial disruption" in the mind of any objective observer. On the other hand, "fair comment" on homosexual issues in appropriate adult forums would plainly be protected under any fair application of Subsection C's list of extenuating factors. Thus, only by assuming that those who enforce the statute will arbitrarily disregard its specific standards can the statute be construed as overbroad. Since such an assumption is not for the courts to make, there is no lawful justification for the Tenth Circuit's decision.

III. THE COURT MISAPPLIED THE OVERBREADTH DOCTRINE IN HOLDING THE STATUTE UNCONSTITUTIONAL ON ITS FACE.

A. Rejecting State Legislation as Facially Unconstitutional for Overbreadth Is Rarely Justified.

In *Wisconsin v. Yoder*, *supra*, this Court stressed that the maintenance of an effective public school system "ranks at the very apex of the functions of a State."

406 U.S. at 205. The statute in question here represents the sound judgment of the Oklahoma legislature on a difficult issue lying at the core of that educational function—the teacher/student relationship. Yet the Tenth Circuit struck down the statute solely on the basis of fears as to its hypothetical application, with no reference whatsoever to the regulation's underlying objectives or its likely application in actual practice. The Court of Appeals ruling represents an insupportable misuse of the doctrine of "facial" unconstitutionality for alleged "overbreadth."

In *Yonger v. Harris*, 401 U.S. 37, 52 (1971), Justice Black stressed that the federal judicial power to resolve concrete disputes "does not amount to an unlimited power to survey the statute books and pass judgment on laws before courts are called upon to enforce them." For these reasons, this Court has stressed that decisions based on a statute's facial overbreadth are an "exception to the traditional rules of practice" and their "function is a limited one." *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). As further stressed in *Broadrick*, 413 U.S. at 613, a statute should not "be discarded in toto because some person's arguably protected conduct may or may not be caught or chilled by the statute." The Court further stated:

> Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. *Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.* [Emphasis added.]

Nor is facial overbreadth adjudication appropriate merely because a statute could conceivably be used to affect constitutionally protected speech. As the Second Circuit observed in *United States v. Carrier*, 672 F.2d 300, 306 (2d Cir. 1982), "The fact that an issue of free

speech arises creates no exception to the principle that courts are not legislators."

Thus, in *Arnett v. Kennedy*, 416 U.S. 134 (1974), this Court rejected an overbreadth challenge to a federal statute providing for the discharge of civil service employees for "such cause as will promote the efficiency of the service." The plaintiff had been removed from his position under this provision for making allegedly defamatory statements (allegations of bribery) about fellow employees.

Recognizing that the statute authorized dismissal for speech as well as other conduct, the Court stressed that the act "did not intend to authorize discharge [for] speech which is constitutionally protected." The Court refused to assume that the statute's broad and imprecise prohibition—far broader and far more imprecise than the statute at hand here—would be abused to threaten genuine First Amendment rights. This same principle of respect and deference for the lawful intent and objectives of the legislature was reflected in this Court's rejection of a renewed "facial" challenge to Hatch Act restrictions on political expression in *U.S. Civil Service Commission v. National Ass'n of Letter Carriers, supra.*

The prudent judicial restraint reflected in cases such as *Broadrick*, *Arnett*, and *Letter Carriers* decisively militates against the reflexive approach to "facial overbreadth" challenges adopted by the Tenth Circuit below. Indeed, had this Court applied the type of "worst case" analysis used by the Tenth Circuit—i.e., measuring the law's validity on the basis of the most unfavorable application which challenging counsel can hypothesize—then the Hatch Act and numerous other public employee regulations approved by this Court would be stricken from the statute books.

The Tenth Circuit clearly erred in applying a mechanical, "worst case" version of the "facial overbreadth"

doctrine to this narrow and carefully drafted regulation of public school teachers.

B. The Oklahoma Statute is Plainly Susceptible to a Construction Which Avoids Unconstitutional Effects.

The Court of Appeals decision disregarded the critical admonition that a statute should not be condemned merely because "some person's arguably protected speech" might somehow be caught or chilled by its misapplication. *Broadrick*, *supra*, 413 U.S. at 613. Rather than considering the potential dangers which the legislature so obviously intended to reach—e.g., teachers indoctrinating their pupils to the view that proscribed homosexual acts are natural or healthy, or actually encouraging them to experiment with such acts—the panel seized upon remote scenarios which the statute is plainly *not* designed to affect.

This approach distorts the proper role of judicial review. If the statute is readily subject to a reasonable, narrowing construction, the court should adopt that construction in passing on the statute's constitutionality. *Broadrick*, *supra*, 413 U.S. at 613. This principle applies with added force in the case of non-criminal regulations limited to public employees such as teachers, where the state's supervisory competence is entitled to considerable deference. See *Waters v. Peterson*, 495 F.2d 91, 99 (D.C. Cir. 1973). The courts simply should not assume that the states will apply such regulations harshly or with disregard for the Constitution.

Only by positing the most extreme and unseemly application of the Oklahoma law was the court able to improvise a rationale for striking it down. Thus, the court promptly seized upon the law school-style hypothetical of a teacher wishing to testify before the state legislature in favor of abolishing the state's anti-sodomy

statute. Supplying the hypothetical teacher with a hypothetical script—carefully phrased to violate the letter of the statute while advocating homosexual activity in the most "respectable" fashion—the court assumed that the statute would likely be applied to such situations and thereby invade "the core of First Amendment protections."

Not only is this "worst case"-hypothetical approach improper, *Broadrick*, 413 U.S. at 613, but there is no reasonable basis to assume that this statute would result in *any* penalty for the kind of speech posited. The statute does not *prohibit* advocacy of the type portrayed in the court's hypothetical; it merely provides that such speech may form the basis of a fitness inquiry which evaluates the speech in relation to specific factors reflecting the state's legitimate concerns respecting harm to schoolchildren and the educational process. Those factors, enumerated under Subsection C of the statute, would manifestly preclude its application to responsible advocacy of homosexual rights in appropriate adult forums.

Thus, a teacher's exercise of the First Amendment right to testify before the legislature would likely qualify as an "extenuating circumstance" under Factor 3. Similarly, the factors concerning likely adverse effect on students, proximity to the teacher's duties, and the repetitive or continuing nature of the conduct would also persuasively militate against an "unfitness" finding with respect to the posited testimony or similar protectable expression. The inclusion of these exculpatory factors in the statute clearly reflects the State's concern and sensitivity for the teacher's legitimate speech rights. Since consideration of these factors is a *mandatory* component of the ultimate determination of fitness or unfitness, there is no credible basis for concluding that the statute would be arbitrarily used to punish speech which is not within the legitimate area for regulation.

These considerations render the statute "readily subject" to a constitutional construction, and the District Court so found. The Court of Appeals erred in holding to the contrary.

CONCLUSION

The statute challenged in this case represents the responsible, good-faith efforts of the Oklahoma legislature to address a subject of legitimate and fundamental concern. Judicial review of its validity should appreciate its genuine concern for the well-being of schoolchildren and its very limited application. The statute is carefully framed to reach only the advocacy or encouragement of illegal homosexual acts in a manner likely to impact on schoolchildren. It includes built-in safeguards to prevent its misapplication to legitimately protected speech. In light of these considerations, the Court of Appeals erred in condemning the statute as facially unconstitutional. The Tenth Circuit's decision should therefore be reversed.

Respectfully submitted,

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